Supreme Court, U.S.
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No. 97-959

In The

Supreme Court of the United States

October Term, 1997

CHARLES GUNN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE IOWA DRAINAGE DISTRICT ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "wetland" and "swampbuster" legislation's "converted wetland" criteria and corresponding "exemption" designations, as applied by the United States Department of Agriculture and the Natural Resources Conservation Service, violate the express language of the Act and frustrate the intent of Congress.

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AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE IOWA DRAINAGE DISTRICT ASSOCIATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself and the Iowa Drainage District Association in support of Petitioner, Charles Gunn. Pursuant to Supreme Court Rule 37.2, this *amici curiae* brief is filed with written consent of all the parties.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

The Iowa Drainage District Association is a non-profit entity established in 1990. As allowed by the State of Iowa, the association was established to provide for the mutual protection and benefit of the more than 3,000 drainage districts it represents in 26 Iowa counties, including the county in which this action took place, Greene County. One of the primary functions of the association is to assist drainage districts and property owners with federal agency application of swampbuster and wetland provisions of federal law, in that Iowa drainage district laws often conflict with the swampbuster and

[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

wetland provisions. Because the Iowa Drainage District Association was established to assist Iowa drainage districts and the corresponding property owners, it has a direct and substantial interest in the issues presented in this case.

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest, legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited government, and the free enterprise system.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's description of the opinions below, statement of jurisdiction, and statement of the case.

SUMMARY OF ARGUMENT

When Congress specifically expressed its intent by enacting, and subsequently amending, the statutes applicable in this case, the United States Department of Agriculture ("USDA") and the Natural Resources Conservation Service ("NRCS")[2] were required to implement the

[2] On October 13, 1994, Congress authorized renaming the Soil Conservation Service ("SCS") as the Natural Resources

statutes as enacted and amended. These unambiguous statutes provide the USDA and the NRCS with the authority to implement rules, but not with the discretion to implement additional criteria in direct conflict with statutory intent or with the discretion to ignore existing statutory and regulatory provisions.

Congress enacted specific statutory criteria for "converted wetlands" and corresponding "exemptions" from program ineligibility. Thus, when a property owner's activities on a parcel of land fall within those "converted wetland" criteria and corresponding "exemptions," the USDA and the NRCS must recognize the "converted wetland" designation and "exemption." "The USDA and the NRCS do not have the discretionary authority to add criteria beyond the intent of Congress, especially when the additional criteria redefine "converted wetland" and the application of the corresponding exemptions."

Conservation Service ("NRCS"). PL-103-354, Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION VIOLATES THE EXPRESS LANGUAGE OF THE WETLAND AND SWAMPBUSTER LEGISLATION AND FURTHERMORE FRUSTRATES THE INTENT OF CONGRESS.

A. STANDARD OF REVIEW

The Administrative Procedure Act ("APA") allows an individual to seek judicial review of agency action that constitutes a legal wrong or if the individual is affected adversely or aggrieved within the meaning of a relevant statute. Administrative Procedure Act, 5 U.S.C., Chapter 7-Judicial Review, §§ 702, 704, and 706. Section 706 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The receiving court shall . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The APA requires the court to determine whether the agency based its decision on relevant factors or whether it made a clear error of judgment, which requires the court to set aside the decision as arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. *Sierra Club v. U.S. Forest Service*, 46 F.3d 835, 838 (8th Cir. 1995). The Supreme Court requires the reviewing court to ensure that all relevant factors were considered by the agency and that no judgmental error occurred. *Citizens for Environmental Quality v. U.S.*, 731 F.Supp. 970, 983 (1989). In addition to a reasoned basis for its action, the agency must set forth that basis in the administrative record, including all relevant data and other factors. *Downer v. U.S. By and Through U.S. Department of Agriculture*, 97 F.3d 999, 1002 (8th Cir. 1996).[3] Under the APA, the court must:

> look[ ] to whether the agency considered those factors Congress intended it to consider, whether the agency considered factors Congress did not intend it to consider, whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it; or whether there is such a lack of rational connection between the facts found and the decision made that the disputed decision cannot "be ascribed to a difference in view or the product of agency expertise."

Id. at 1002 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

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[3] See also *Rauenhorst v. U.S. Department of Transportation, Federal Highway Administration*, 95 F.3d 715, 718-719 (8th Cir. 1996); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1996); *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2866-2867 (1983).

When analyzing an agency's interpretation and implementation of a particular statute, the court must first look at the intent of Congress as expressed in the statute. The Supreme Court has held:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2781-2782 (1984)[4]. The analysis starts and ends with the statute itself. *Northern States Power Co. v. U.S.*, 73 F.3d 764, 766 (8th Cir. 1996).[5]

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[4] In FN9 of *Chevron*, the Court reaffirmed that the judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent. If an intent on the question at issue is identified, that intent is the law and must be given effect. See, e.g., *FEC v. Democratic Senatorial Campaign Committee*, 102 S.Ct. 38, 42 (1981); *SEC v. Sloan*, 98 S.Ct. 1702, 1711-1712 (1978); *FMC v. Seatrain Lines, Inc.*, 93 S.Ct. 1773, 1784-1785 (1973); *Volkswagenwerk v. FMC*, 88 S.Ct. 929, 935 (1968); *NLRB v. Brown*, 85 S.Ct. 980, 988 (1965); *FTC v. Colgate-Palmolive Co.*, 85 S.Ct. 1035, 1042 (1965); *Social Security Board v. Nierotko*, 66 S.Ct. 637, 643 (1946); *Burnet v. Chicago Portrait Co.*, 52 S.Ct. 275, 281 (1932); *Webster v. Luther*, 16 S.Ct. 963, 967 (1896).

[5] When the intent of Congress is clear from the words of the statute, that is the "end of the judicial inquiry." *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1440 (8th Cir. 1993). Therefore, a

Thus, in reviewing the administrative action below, the court must determine if the specific statutes are unambiguous or silent. If unambiguous, the statutory language controls and the contrary view of the agency is rejected. If silent or ambiguous, the court must then determine whether the agency's regulations conflict with Congressional intent and whether the agency action is consistent with both the statute and the agency regulations.

B. STATUTORY AND REGULATORY PROVISIONS

With passage of the Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624; and the Federal Agriculture Improvement and Reform Act of 1996, PL-104-127; Congress expressed its intent to preserve and protect wetlands. However, in an effort to provide protection to property owners, Congress identified various exemptions to the provisions of the legislation.[6]

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court may not defer to the agency decision. When Congress leaves a statute silent or ambiguous, relative to a specific issue, an administrative agency has the power to make rules to fill the void left by Congress. *Chevron, supra.* See also *Wittler v. Chater,* 59 F.3d 95 (8th Cir. 1995) (the court will affirm the Secretary's interpretation "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent) and *Northern States Power Co. v. U.S.,* 73 F.3d 764, 766 (8th Cir. 1996).

[6] The Eighth Circuit has dealt previously with the application of the new swampbuster and wetlands laws after a

Congress defined "wetland" as land that:

> (A) has a predominance of hydric soils;
>
> (B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (C) under normal circumstances does support a prevalence of such vegetation.

16 U.S.C.A. § 3801(a)(18). Congress then defined "converted wetland" as:

> [L]and that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action
>
> (I) such land was wetland; and
>
> (II) such land was neither highly erodible land nor highly erodible cropland.

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lower court judgment, but prior to a final decision on appeal. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199 (8th Cir. 1992). The court held that in passing the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624, Congress intended retroactive application of the law when applying the "good faith exemption" status to property owners. *Id.* at 1204-1205.

16 U.S.C.A. § 3801(a)(6)(A). In 16 U.S.C.A. § 3821(a) and (c), Congress provided that property owners would be ineligible for USDA program loans and payments if the owner "produces an agricultural commodity on converted wetland. . . . " However, Congress provided various exemptions to ineligibility under § 3821, including:

> No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:
>
> (1) As the result of the production of an agricultural commodity on the following lands:
>
> (A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985. . . .
>
> (G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of
>
> (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
>
> (ii) a lack of management of the lands containing the wetland; or
>
> (iii) circumstances beyond the control of the person. . . .
>
> (2) For the conversion of the following. . . .
>
> (D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of

> (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
>
> (ii) a lack of management of the lands containing the wetland; or
>
> (iii) circumstances beyond the control of the person.

16 U.S.C.A. § 3822(b).[7]

In order to implement the wetlands and swampbuster provisions of the Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; the Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624; and the Federal Agriculture Improvement and Reform Act of 1996, PL-104-127; the Secretary of Agriculture authorized the USDA and the NRCS to develop implementation rules, which are located in 7 CFR Subtitle A-Office of the Secretary of Agriculture, Part 12-Highly Erodible Land and Wetland Conservation, Subpart A-General Provisions, §§ 12.1-12.12 and Subpart C-Wetland Conservation, §§ 12.30-12.34.[8] The specific rules pertinent to this case are §§ 12.2(a)(6), 12.5(b)(1), 12.5(b)(2), and 12.33(b). In rule 12.2(a)(6), the USDA and the NRCS changed Congress' definition of "converted wetland" by adding:

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[7] See FN4. In amending § 3822(b), Congress retained exemption (1)(A) and added exemptions (1)(G) and (2)(D). As with the 1990 amendments, Congress intended to apply legislation retroactively by identifying the date certain (December 23, 1985) for activities subject to the legislation.

[8] Authority is granted under 16 U.S.C. § 3801 *et seq.*

> . . . . that makes possible the production of an agricultural commodity without further application of the manipulations described herein. . . . [9]

The phrase "without further manipulation" has been placed in rule 12.5(b)(2), thus changing the intent of Congress.[10] Rule 12.33(b) also changed Congress's intent by restricting the use of established exemptions.[11]

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[9] Thus altered, the statutory language read in regulation as:

> Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) **that makes possible the production of an agricultural commodity without further application of the manipulations described herein** if (i) such production would not have been possible but for such action; and (ii) before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

7 CFR § 12.2(a)(6). (Emphasis added).

[10] Thus altered, the statutory language reads in regulation as:

> The conversion of a wetland, for purposes of this section, is considered to have been completed before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible **without further manipulation** described herein where such production on the wetland would not otherwise have been possible.

7 CFR § 12.5(b)(2). (Emphasis added).

[11] Thus altered, the statutory language reads in regulation as:

Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985, is exempted by law from these regulations for the area which was converted **or the minimum area the commenced activity could convert**. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or maintenance operations related to the production of agricultural commodities on "converted wetland." Where the cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment. Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, **provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS, and provided that the area is not abandoned.**

C. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE NATURAL RESOURCES CONSERVATION SERVICE FAILED TO CONSIDER ONLY THE FACTORS CONGRESS INTENDED THEM TO CONSIDER FOR ISSUING A "WETLAND," "CONVERTED WETLAND," AND CORRESPONDING "EXEMPTION" DECISION.

In enacting wetland and swampbuster legislation, Congress expressed its intent to exempt conversion activities commenced prior to December 23, 1985. In providing this conversion exemption, Congress specifically set forth the criteria for identifying converted wetland, which criteria have remained unchanged during all subsequent amendments. When Congress defined a drained wetland as a "converted wetland," if drained to produce an agricultural commodity or to have the effect of making agricultural commodity production possible, it did so clearly and unambiguously. Any change to the definition adopted by Congress, however minor, is a change in express statutory language and thus the intent of Congress and beyond the authority granted the agency by

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7 CFR § 12.33(b). (Emphasis added). By utilizing the agency's 1/8-inch drainage coefficient criteria in its "wetland" and "converted wetland" determination of Mr. Gunn's property, the USDA and the NRCS maintain that the original conversion would not have effectively drained 160 acres. Thus, they reduced the total number of acres originally converted with the 1906 drainage project. By reducing the total number of acres originally converted, the agency could then claim that additional "wetland" acres were converted with the intent to bring additional "wetlands" into agricultural production. Therefore, according to the USDA and the NRCS a violation occurred. See FN 10.

Congress. Congress knows "very well" how to mandate something. *Northern States Power Co. v. U.S.*, 73 F.3d 764, 767 (8th Cir. 1996). Congressional exclusion of drainage evaluation factors, hydrologic analyses, and evaluation of additional drainage manipulation activities in defining "converted wetlands" is a clear mandate to prohibit their application. Where the intent of Congress is clear, as it is here, it governs. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, 955 F.2d 1199, 1204 (8th Cir. 1992) (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S.Ct. 1570, 1577 (1990)).

The USDA and the NRCS recognized that Mr. Gunn's property contained a tile drainage system, which was installed in 1906 to convert wetland to cropland. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994. All acreage in the quarter section was converted to cropland, including the acreage above the tile drainage system, and since then has been continuously cropped or enrolled in government set-aside programs.[12] Thus, these

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[12] The District Court's reliance on *Von Eye v. U.S.*, 92 F.3d 681 (8th Cir. 1996) and the Defendant's reference to *Von Eye, supra*, and *Downer v. U.S. By and Through U.S. Dept. of Agr.*, 97 F.3d 999 (8th Cir. 1996) as controlling in this instance are unwarranted. In both *Von Eye* and *Downer* the property owner brought additional wetlands into production with the identified conversion project, whereas here Mr. Gunn brought no new wetlands into production. According to the USDA and the NRCS regulations, maintenance and improvements of prior converted wetlands are not subject to the rule, provided "additional" wetlands are not brought into production. 7 CFR § 12.33(b). The rule continues by defining "additional" as any natural or converted wetland that has reverted to wetland as a result of abandoning crop production. The rule also states that

activities and lands fall clearly within the "converted wetland" criteria established by Congress, yet the USDA and the NRCS arbitrarily ignored those criteria and utilized their own criteria.[13] Utilizing their own criteria to evaluate Mr. Gunn's property, instead of the criteria set out by Congress, is a clear violation of a federal statute and the will of Congress. Thus, the contested acres should be exempt because the drainage activity converted the acres prior to December 23, 1985, in accordance with the statute and the will of Congress.

D. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE NATURAL RESOURCES CONSERVATION SERVICE FAILED TO CONSIDER THE 1996 "WETLAND" AND "CONVERTED WETLAND" AMENDMENTS ENACTED IN THE FEDERAL AGRICULTURE IMPROVEMENT AND REFORM ACT OF 1996.

The addition of 16 U.S.C. § 3822(b)(1)(G) and (b)(2)(D) of the Federal Agriculture Improvement and

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non-production due to enrollment in the USDA set-aside programs is not abandonment. Since the 1906 installation of the tile drainage system, all 160 acres in the quarter section owned by Mr. Gunn have been farmed or enrolled in the USDA programs. Thus, even the USDA and the NRCS rules point to the logical conclusion: these acres are exempt from swampbuster. See FN 9.

[13] In the CPA-Wetland Determination Appeal issued on August 9, 1994, by the USDA-NRCS, the agency stated that the "converted wetland" determination was based upon a drainage system current capacity analysis utilizing a 1/8-inch drainage coefficient for removal of wetland hydrology and an estimate of potential ponding utilizing the drainage system topographical data. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994.

Reform Act of 1996, PL-104-127, which amended 16 U.S.C. § 3822(b), expands the list of statutory exemptions to agricultural program ineligibility. *Supra*, see discussion at I(B), pp. 6-9. These provisions provide a "converted wetland" exemption on acreage where the originally converted acreage has been returned to land with wetland characteristics due to a lack of drainage maintenance and circumstances beyond the control of the property owner. These amendments, adopted in 1996, provide additional evidence that Congress intended all drained, dredged, filled, leveled, or otherwise manipulated wetlands to be exempt from agricultural program ineligibility, if such manipulation was commenced or completed prior to December 23, 1985. As a result of its clear and unambiguous actions, Congress did not authorize the USDA and the NRCS to act as they have in this case. The agencies must interpret and apply the statute as written. Mr. Gunn's land is exempt from ineligibility by an Act of Congress.

The USDA and the NRCS have argued that the acreage in question was not a "converted wetland" at the time of December 23, 1985, because the acreage exhibited wetland characteristics. *USDA-NRCS, CPA Wetland Determination Appeal*, p. 3, August 9, 1994. This argument fails for two reasons. First and foremost, the 1996 amendment provides that any such acreage returning to wetland characteristics will still be exempted from ineligibility. 7 CFR § 12.33(b). Second, the determination of the USDA and the NRCS exceeds the delegated Congressional authority and violates the intent of Congress. Food Security Act of 1985, 16 U.S.C. §§ 3821-3824, as amended; Food, Agriculture, Conservation and Trade Act of 1990, PL-101-624;

and Federal Agriculture Improvement and Reform Act of 1996, PL-104-127.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant *certiorari* to review the Eighth Circuit's decision in the instant case. Congress expressed its intent to protect national wetlands, but not at the expense of eliminating agricultural acreage. Congressional exemptions to swampbuster provisions allow property owners to continue to use prior "converted wetlands" without incurring USDA program ineligibility. The failure of the USDA and the NRCS to utilize existing statutory criteria in identifying Mr. Gunn's 160 acres as a prior "converted wetland," due to the installation of the 1906 tile drainage system, is not within the agency's delegated powers. The USDA and the NRCS erred when they decided that Mr. Gunn's property was not prior "converted wetland;" thus, that decision must be reversed.

DATED: January 7, 1998.

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